

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
EMPIRE GARDEN RESTAURANT CORP.	:	DETERMINATION
	:	DTA NO. 823761
for Revision of a Determination or for Refund of Sales and	:	
Use Taxes under Articles 28 and 29 of the Tax Law for the	:	
Period December 1, 2006 through August 31, 2009.	:	

Petitioner, Empire Garden Restaurant Corp., filed a petition for revision of a determination or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the period December 1, 2006 through August 31, 2009.

The Division of Taxation, by its representative, Daniel Smirlock, Esq. (John E. Matthews, Esq., of counsel), brought a motion on February 14, 2011 seeking summary determination in the above-referenced matter pursuant to sections 3000.5, 3000.9(a)(i) and (b) of the Rules of Practice and Procedure of the Tax Appeals Tribunal. Accompanying the motion was the affidavit of John E. Matthews, dated February 14, 2011, and annexed exhibits. Petitioner did not file a response to the Division of Taxation's motion. Accordingly, the 90-day period for the issuance of this determination began on March 17, 2011, the due date for petitioner's response. Based upon the motion papers, the affidavits and documents submitted therewith, and all pleadings and documents submitted in connection with this matter, Herbert M. Friedman, Jr., Administrative Law Judge, renders the following determination.

ISSUE

Whether petitioner filed a timely Request for Conciliation Conference with the Bureau of Conciliation and Mediation Services following the issuance of a Notice of Determination.

FINDINGS OF FACT

1. The subject of the motion of the Division of Taxation (Division) is the timeliness of petitioner's protest of a Notice of Determination dated December 14, 2009 and bearing assessment identification number L-033110899. The notice is addressed to petitioner, Empire Garden Restaurant Corp., at "1656 Hillside Ave, New Hyde Park, NY 11040-2604."

2. Petitioner filed a Request for Conciliation Conference with the Division's Bureau of Conciliation and Mediation Services (BCMS) in protest of the December 14, 2009 Notice of Determination. The request was dated April 21, 2010, was mailed on June 22, 2010, and received by BCMS on June 24, 2010.

3. On July 9, 2010, BCMS issued a Conciliation Order Dismissing Request to petitioner. The order determined that petitioner's protest of the subject Notice of Determination was untimely and stated, in part:

The Tax Law requires that a request be filed within 90 days from the mailing date of the statutory notice. Since the notice(s) was issued on December 14, 2009, but the request was not mailed until June 22, 2010, or in excess of 90 days, the request is late filed.

4. To show proof of proper mailing of the December 14, 2009 Notice of Determination, the Division provided the following with its motion papers: (i) an affidavit, dated February 3, 2011, of Patricia Finn Sears, a supervisor in the Division's Case and Resource Tracking System (CARTS); (ii) pages numbered 1, 133, and 327 from the "Certified Record for Presort Mail - Assessments Receivable" (CMR) each postmarked December 14, 2009; (iii) an affidavit, dated

February 8, 2011, of Bruce Peltier, a mail and supply supervisor in the Division's Mail Processing Center; (iv) an affidavit, dated February 9, 2011, of Heidi Corina, a legal assistant in the Division's Office of Counsel involved in making requests to the United States Postal Service (USPS) for delivery information; (v) a Postal Service form 3811-A (Request for Delivery Information/Return Receipt after Mailing) and the USPS response to such request dated October 29, 2010; (vi) a copy of the December 14, 2009 Notice of Determination with the associated mailing cover sheet; and (vii) petitioner's quarterly sales tax return for the period ended October 31, 2009, which lists the same address for petitioner as that listed on the subject notice, along with an associated check for payment dated November 15, 2009.¹ This sales tax return was the last return filed with the Division by petitioner before the notice was issued.

5. The affidavit of Patricia Finn Sears sets forth the Division's general practice and procedure for processing statutory notices. Ms. Sears receives from CARTS the computer-generated CMR and the corresponding notices. The notices are predated with the anticipated date of mailing. Each page of the CMR lists an initial date that is approximately 10 days in advance of the anticipated date of mailing. Following the Division's general practice, this date was manually changed on the first page of the CMR in the present case to the actual mailing date of "12/14/09." In addition, all pages of the CMR are banded together when the documents are delivered into possession of the USPS and remain so when returned to her office. The pages of the CMR stay banded together unless otherwise ordered by Ms. Sears. The page numbers of the CMR run consecutively, starting with "PAGE 1," and are noted in the upper right corner of each page.

¹ The same address for petitioner is also listed on its Request for Conciliation Conference dated April 21, 2010 and on its petition, dated July 22, 2010.

6. All notices are assigned a certified control number. The certified control number of each notice is listed on a separate one-page mailing cover sheet, which also bears a bar code, the mailing address and the Departmental return address on the front, and taxpayer assistance information on the back. The certified control number is also listed on the CMR under the heading entitled "Certified No." The CMR lists each notice in the order the notices are generated in the batch. The assessment numbers are listed under the heading "Reference No." The names and addresses of the recipients are listed under "Name of Addressee, Street and PO Address."

7. According to the Sears affidavit, the CMR in the present matter consists of 327 pages and lists 3,594 certified control numbers along with corresponding assessment numbers, names and addresses. There are no deletions from the list. Ms. Sears notes that the portion of the CMR that is attached to her affidavit has been redacted to preserve the confidentiality of information relating to taxpayers who are not involved in this proceeding. She states that the USPS representative affixed a postmark to each page of the CMR, wrote "3594" on page 327, and initialed or signed that page.

8. Attached to the Sears affidavit, as exhibit "A," is a copy of pages 1, 133 and 327 of the CMR issued by the Division on December 14, 2009. Pages 1 and 327 have a handwritten entry of "12/14/09" in the top left corner; however, page 133 does not have a similar entry.

9. Page 133 of the CMR indicates that a Notice of Determination with certified control number 7104 1002 9730 1699 5754 and assessment ID number L-033110899 was mailed to petitioner at the New Hyde Park, New York, address listed on the subject Notice of Determination. The corresponding mailing cover sheet, attached to the Sears affidavit as exhibit "B," bears this certified control number and petitioner's name and address as noted.

10. The affidavit of Bruce Peltier, a mail and supply supervisor in the Division's Mail Processing Center (Center), describes the Center's general operations and procedures. The Center receives the notices and places them in an "Outgoing Certified Mail" area. Mr. Peltier confirms that a mailing cover sheet precedes each notice. A staff member retrieves the notices and mailing cover sheets and operates a machine that puts each notice and mailing cover sheet into a windowed envelope. Staff members then weigh, seal and place postage on each envelope. The envelopes are counted and the names and certified control numbers verified against the CMR. A staff member then delivers the envelopes and the CMR to one of the various USPS branches located in the Albany, New York, area. A USPS employee affixes a postmark and also places his or her signature on the CMR, indicating receipt by the post office. The Center further requests that the USPS either circle the total number of pieces received or indicate the total number of pieces received by writing the number on the CMR. Each of the three pages of the CMR in exhibit "A" of the Sears affidavit contains a USPS postmark of December 14, 2009. On page 327, corresponding to "Total Pieces and Amounts," is the preprinted number 3,594, and next to "Total Pieces Received At Post Office" is the handwritten entry "3594" along with initials or a signature.

11. According to the Sears affidavit, the affixation of the postmarks and the Postal Service employee's initials indicate that all 3,594 articles of mail listed on the CMR, including the article addressed to petitioner, were received by the USPS on December 14, 2009.

12. According to both the Sears and Peltier affidavits, a copy of the subject notice was mailed to petitioner and to its representative on December 14, 2009, as claimed.

13. The affidavit of Heidi Corina describes the Division's requests to the USPS for delivery information on the subject Notice of Determination. Specifically, using PS Form 3811-

A, the Division requested delivery information with respect to the article of mail bearing certified control number 7104 1002 9730 1699 5754. The USPS response to this request indicates that the article bearing certified control number 7104 1002 9730 1699 5754 and addressed to petitioner was delivered as addressed on December 16, 2009. Attached to the Corina affidavit as exhibit “A” is the Division’s “Request For Delivery Information” for article number 7104 1002 9730 1699 5754. Exhibit “B” to the Corina affidavit is the USPS response to the Division’s request indicating delivery of the same article on December 16, 2009 to “1656 Hillside Ave” in “New Hyde Park, NY 11040.”

CONCLUSIONS OF LAW

A. A motion for summary determination may be granted:

if, upon all the papers and proof submitted, the administrative law judge finds that it has been established sufficiently that no material and triable issue of fact is presented and that the administrative law judge can, therefore, as a matter of law, issue a determination in favor of any party (20 NYCRR 3000.9[b][1]).

B. Tax Law § 1138(a)(1) authorizes the Division of Taxation to issue a Notice of Determination to a taxpayer where “a return required by [Article 28 of the Tax Law] is not filed, or if a return when filed is incorrect or insufficient.” This section further provides that such a notice “shall be mailed by certified or registered mail to the person or persons liable for the collection or payment of the tax at his last known address in or out of this state.”

C. A taxpayer may file a Request for Conciliation Conference with the BCMS seeking revision of the determination within 90 days of the mailing of a Notice of Determination (*see* Tax Law § 170(3-a)(a); § 1138[a][1]). If a taxpayer fails to file a timely petition protesting a statutory notice, the Division of Tax Appeals has no jurisdiction over the matter and is precluded from

hearing the merits of the case (*see Matter of Sak Smoke Shop*, Tax Appeals Tribunal, January 6, 1989).

D. Where, as here, the timeliness of a Request for Conciliation Conference or petition is at issue, the initial inquiry is whether the Division has carried its burden of demonstrating the fact and date of the mailing to petitioner's last known address (Tax Law § 1147[a][1]; *see Matter of Katz*, Tax Appeals Tribunal, November 14, 1991). To meet its burden, the Division must show proof of a standard procedure used by the Division for the issuance of statutory notices by one with knowledge of the relevant procedures, and must also show proof that the standard procedure was followed in this particular instance (*see Matter of Katz; Matter of Novar TV & Air Conditioner Sales & Serv.*, Tax Appeals Tribunal, May 23, 1991).

E. Here, the Sears and Peltier affidavits establish the Division's standard mailing procedure. As to whether such procedures were followed in this instance, a properly completed CMR is highly probative evidence of the mailing of a statutory notice to the address indicated thereon and on the date indicated thereon (*see Matter of Rakusin*, Tax Appeals Tribunal, July 26, 2001). In the present matter, however, such a properly completed CMR is missing from the record. Exhibit "A" of the Sears affidavit contains three pages of what purports to be a longer multi-page computer-generated CMR. Unlike in the procedure described in the Sears affidavit, the three pages in exhibit "A," are not physically connected; the certified mail numbers run consecutively on each page but not from page to page; and the pages are not consecutively numbered. Moreover, the date on the top of pages 1 and 327 has been changed to December 14, 2009, but remains unchanged on page 133. Pages 1 and 327, therefore, bear a different date than page 133. As a result, the partial CMR submitted as exhibit "A" of the Sears affidavit does not

establish that the articulated procedure was followed in this case (*see Matter of Rakusin; Matter of Kushner*, Tax Appeals Tribunal, October 19, 2000).

F. Such a flaw may be overcome, however, by other evidence of mailing in the record (*see Matter of Rywin*, Tax Appeals Tribunal, April 24, 2008). The Division has provided the necessary additional evidence in this matter. Specifically, the USPS delivery information accompanying the Corina affidavit shows that a copy of the notice at issue, addressed to petitioner, which was also listed on the CMR, was delivered as addressed on December 16, 2009. This other evidence of mailing is sufficient to overcome the blemish of the incomplete CMR and establishes the fact of mailing of the subject notice as claimed on December 14, 2009 (*see Matter of Winner's Garage, Inc.*, Tax Appeals Tribunal, May 20, 2010).

G. Petitioner's address on the notice, the corresponding mail cover sheet and the CMR conforms with the address reported on petitioner's New York sales tax return for the quarter ended October 31, 2009, which was the last return filed before the notice was issued. This satisfies the "last known address" requirement in Tax Law § 1138(a)(1). Furthermore, petitioner's request for conciliation conference and petition list the same address (*see* Finding of Fact 4, footnote 1).

H. Based on the foregoing conclusions, the Division has established that it properly mailed the subject Notice of Determination to petitioner on December 14, 2009. Such proper mailing gives rise to a rebuttable presumption of receipt (*see* Tax Law § 1147(a)(1); *Matter of Sugranes*, Tax Appeals Tribunal, October 3, 2002).

I. Petitioner did not respond to the Division's motion; it is therefore deemed to have conceded that no question of fact requiring a hearing exists (*see Kuehne & Nagel v. Baiden*, 36 NY2d 539, 544, 369 NYS2d 667, 671 [1975]; *John William Costello Assocs. v. Standard*

Metals, 99 AD2d 227, 472 NYS2d 325 [1984]). As petitioner has presented no evidence to contest the facts alleged in the Sears, Peltier, and Corina affidavits, those facts may be deemed admitted (*see Kuehne & Nagel v. Baiden*, at 544, 369 NYS2d at 671; *Whelan v. GTE Sylvania*, 182 AD2d 446, 582 NYS2d 170 [1992]).

J. Petitioner's Request for Conciliation Conference was filed on June 22, 2010. This date falls well after the 90-day period of limitations for the filing of such a request. Petitioner's request was therefore untimely filed (*see* Tax Law § 1138[a][1], § 170[3-a][b]). The Division of Tax Appeals thus lacks jurisdiction to consider the merits of petitioner's protest (*see Matter of Rotondi Industries*, Tax Appeals Tribunal, July 6, 2006).

K. The Division of Taxation's motion for summary determination is granted, and the petition of Empire Garden Restaurant Corp. is dismissed.

DATED: Troy, New York
April 28, 2011

/s/ Herbert M. Friedman, Jr. _____
ADMINISTRATIVE LAW JUDGE